No. 98-25

FILED
JUL 30 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

October Term, 1997

FLORENCE H. ALEXANDER, PH.D., An Individual,

Petitioner,

v.

MICHAEL J. BOWERS, Attorney General of Georgia, LEWIS MASSEY, Secretary of State of Georgia, in their official capacities, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Georgia

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENTS

JOHN B. BALLARD, JR.
Counsel of Record for Respondent
Senior Assistant Attorney General

THURBERT E. BAKER
Attorney General

DANIEL M. FORMBY
Deputy Attorney General

Please serve:

JOHN B. BALLARD, JR.
40 Capital Square
Atlanta, Georgia 30334-1300
(404) 656-5734

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

I.

Should this Court grant certiorari to review a restraining order at an early stage of civil, regulatory litigation, complicated by removal and bankruptcy proceedings?

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PART ONE

STATEMENT OF THE CASE

Parents and students of a closed preparatory school commenced this civil suit in the Superior Court of Monroe County, Georgia, on March 14, 1997. They sued Petitioner and the foreign non-profit corporation, Ebon Foundation, Inc., seeking equitable and legal relief under various theories. In part, the original complaint seeks to reach Petitioner by piercing the corporate veil.

On April 24, 1997, Petitioner's sister moved to intervene in order to bring a derivative action. She also successfully moved for an *ex parte*, temporary order restraining a pending sale of the school facility. Respondents in this Brief, the Secretary of State and the Attorney General of Georgia, moved to intervene in the suit on April 30, 1997, at which time the Superior Court also commenced the first of two days of interlocutory hearings. The Secretary of State alleges violations of the Georgia Charitable Solicitations Act, O.C.G.A. §§ 43-17-1 *et seq*. The Attorney General alleges that Petitioner so disregarded the corporate status of Ebon Foundation, Inc., that its assets became a charitable trust. The State Intervenors sought judicial protection for the charitable assets. [The Georgia Supreme Court has held that the conventional operation of a college by a corporation does not constitute a charitable trust. *Corporation Of Mercer University v. Smith*, 258 Ga. 509, 371 S.E.2d 858 (1988). Also, Ebon is a District of Columbia corporation. The Georgia Nonprofit Corporations Code excepts foreign corporations from certain powers it gives the Attorney General in respect to domestic, charitable corporations. O.C.G.A. §§ 14-3-140(6)

(definition of "corporation"); 14-3-170 (powers of the Attorney General over charitable corporations); 14-3-1302(a)(2) (describing charitable corporations). The Attorney General has traditional powers over charitable trusts. O.C.G.A. § 53-12-115.]

In a subsequent hearing the Superior Court sealed a sales contract before it but permitted a sale under its terms, so long as the sale proceeds are placed into the registry under supervision of a limited receiver. [The State considers the content of the sealed contract material, and a brief analyzing its terms with respect to issues in this case is under seal in the record of the Georgia Supreme Court.] The Superior Court said that it would consider approving a sale on other terms. The Superior Court also granted the motions to intervene, approved an application for interlocutory appeal, and stayed discovery. The Georgia Supreme Court allowed interlocutory review on July 14, 1997.

Ebon Foundation, Inc., filed a Chapter 11 bankruptcy petition in the Middle District of Florida on November 11, 1997. Notice of the stay was filed in Superior Court but not concurrently in the Supreme Court. Ebon Foundation, Inc., participated in the appeal to the Georgia Supreme Court by counsel, through briefs and oral argument.

Petitioner filed a notice of removal of this suit under 28 U.S.C. § 1452 in the Middle District of Georgia on February 10, 1998. Notice of the removal was filed in Superior Court but not concurrently in the Supreme Court, which decided the appeal on February 23, 1998. Petitioner participated in the appeal to the Georgia

Supreme Court by counsel, through briefs and oral argument. After the Supreme Court affirmed the trial court orders, Petitioner moved for rehearing *pro se* on March 5, 1998. In the first part of her motion for rehearing, she asserted removal and attached as an exhibit the notice of removal.

The State Intervenors responded only with respect to the issue of removal. The State advised the Court that it believed the Georgia Supreme Court had jurisdiction until it received the notice of removal, i.e. until Petitioner moved for rehearing. Petitioner replied, and the Georgia Supreme Court dismissed the motion for rehearing on April 2, 1998, and refused to allow a second motion to be filed.

In the Middle District of Georgia, State Intervenors have filed a motion to remand, contending that the Eleventh Amendment prevents removal and contending in any event that the action was one by the State enforcing its police powers.

At the request of the Bankruptcy Court Judge presiding over the Chapter 11 of Ebon Foundation, Inc., the parties, including Petitioner and Respondents, have consented to a June 15, 1998, order in the Middle District of Georgia, which stays proceedings in this suit, including the removal and remand issues, pending events in the Bankruptcy Court of the Middle District of Florida. The Bankruptcy Court is awaiting the report of an Examiner. There is related, collateral litigation involving this general situation in which the State is not involved. The State has had no opportunity to conduct adversarial discovery in this suit.

To summarize, the case is at a preliminary stage and in a complicated status. The State has advised the Georgia Supreme Court, to which the writ would be directed, that the suit is removed from state jurisdiction. There is a stay of the State's motion to remand the suit to state jurisdiction on Eleventh Amendment and police power grounds. The sorting out of the property interests of the Foundation and Petitioner, the State's goal in this suit, remains an active inquiry of the Bankruptcy Court.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

I. THIS COURT SHOULD DECLINE TO GRANT CERTIORARI.

The State respectfully submits that this case is not ripe for review. In any event the intervention of the State has not deprived Petitioner of property. At most the fruit of that intervention has been an order requiring the deposit of sale proceeds into the registry and a need to apply for separate approval of a sale on any other terms. Nor does the State seek any property. It seeks only that charitable assets remain in their status, or be properly expended for charitable activities, and that charitable solicitations follow Georgia law. The State, therefore, also respectfully submits that no issue is presented which warrants review by certiorari.

CONCLUSION

WHEREFORE, for all the above and foregoing reasons, Respondents pray that this Court deny this petition for a writ of certiorari.

Respectfully submitted,

JOHN B. BALLARD, JR. 035550
Counsel of Record for Respondent
Senior Assistant Attorney General

THURBERT E. BAKER 033887
Attorney General

DANIEL M. FORMBY 750150
Deputy Attorney General

Please serve:

JOHN B. BALLARD, JR.
40 Capitol Square, S.W.
Atlanta, Georgia 30334-1300
(404) 656-5734